No. 85-2064

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JAMES GREER, Warden,
Menard Correctional Center,

Petitioner,

—v.—

CHARLES MILLER,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION AND THE ROGER BALDWIN FOUNDATION OF ACLU, INC. IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE

The American Civil Liberties Union is a nationwide, nonpartisan organization of over 250,000 members; the Roger Baldwin Foundation of ACLU, Inc., is its Illinois state affiliate. The ACLU has been particularly active in preserving and defending substantive constitutional rights of criminal defendants. Amici have also been active in preserving the procedural vehicle of federal habeas corpus, which is critical for the protection of such rights. We submit this brief amicus curiae in the hope that it will assist the Court's resolution of this case, which implicates and threatens both these interests.*

* Letters of consent to the filing of this brief have been lodged with the clerk of the Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

In this case, petitioner asks this Court to ignore well-established precedents in all the Circuits that hold that harmless error analysis applies to a violation of Doyle v. Ohio, 426 U.S. 610 (1976) on federal habeas corpus. See Miller v. Greer, 789 F.2d 438, 442-43 (7th Cir. 1985)(en banc). To escape these precedents (as well as this Court's unanimous assumption to the same effect last Term in Wainwright v. Greenfield, 106 S. Ct. 634, 640 n.13 (1986)), id. at 643 (Rehnquist, J., concurring), petitioner proposes a sweeping reexamination of two basic principles which this Court and all other federal courts have routinely applied: (1) Doyle violations, like other "bright-line" constitutional violations in which fairness and truth-seeking values are implicated, are subject to harmless error analysis; (2) harmless error analysis applies to constitutional error on

federal habeas corpus in the same way and to the same extent as on direct review.

Three years ago this Court directly confronted the latter proposition in Strickland v. Washington, 104 S. Ct. 2052 (1984), in which it held that ineffectiveness of counsel claims must be treated the same way on federal habeas corpus, direct appeal or a motion for a new trial. Id. at 2070. Indeed, in no case has this Court, or any of its members, ever even suggested that, in addition to the other procedural and substantive burdens facing a habeas corpus petitioner, he must also meet a standard more stringent than a defendant on direct appeal and show actual prejudice after he has proven constitutional error. In the face of precedents that reject both parts of the argument here, petitioner seeks to combine them together in the hope that two rejections must mean one acceptance or that two times zero will

yield more than zero. Such topsy-turvy mathematics need only be stated to be rejected.

Petitioner's mechanical argument that a Doyle violation is "only" a general due process claim that requires a showing of actual prejudice is wrong as a matter of analysis and wrong as a matter of precedent. Unlike the cases cited by petitioner, Doyle due process violations are complete upon the state's use of post-Miranda silence at trial. Once constitutional error is found, this Court has applied one of two standards of review -- automatic reversal or harmless error. To determine which applies to a particular claim, the Court examines the nature of the right and how the violation of such right relates to other values in the administration of justice, not what label is given to the right.

The actual prejudice standard has been limited to situations in which it is not clear whether a constitutional violation has occurred

unless the effect of the violation on the outcome of the trial is determined. That approach is inapplicable to Doyle violations since Doyle creates a "bright-line" standard for prosecutors to meet. Doyle violations are analagous to other direct misrepresentations by officers of government that have always been subject to the harmless error rule. In addition Doyle violations can seriously undermine the fairness of any proceeding because of the inherently ambiguous nature of a defendant's silence. The Doyle due process violation is not the effect of the violation on the trial's outcome, but rather, the very use of the post-Miranda silence.

Petitioner's second argument that all constitutional violations must be subject to an actual prejudice standard on habeas corpus review would seriously erode constitutional protection under the great writ. Such judicial rewriting of a statute would be improper,

especially in light of Congress' steadfast refusal to modify the statute along the lines urged by petitioner. It would undermine the nature of collateral review in the federal courts in a revolutionary manner. It would effectively strip federal tribunals of their assigned constitutional and statutory function of guarding the constitutional rights of state prisoners and providing federal oversight of state court interpretation of the Constitution. The argument threatens the entire scheme of federal review of constitutional error, under which this Court on direct review of a few cases and the entire federal judiciary on federal habeas corpus review are engaged in a dynamic, on-going dialogue with state courts to define constitutional protections in criminal cases.

Petitioner's argument sets no limit to the constitutional errors that would be subject to the actual prejudice standard, and thus errors that are now subject to the most stringent

standard -- automatic reversal -- because they render a trial fundamentally unfair or because of the importance of the right to other values would be unreviewable and unreversible in the federal courts unless actual prejudice was shown. Such a result would almost certainly retard the elaboration and explication of important constitutional rights.

Adoption of petitioner's approach would inevitably involve this Court in creating exceptions to its own creation, thus needlessly replicating the Court's ongoing efforts to clarify standards of review of constitutional error. In light of Congressional inaction, such an endeavor does not recommend itself as a matter of judicial administration or as a matter of constitutional law.

Finally, petitioner puts forth this radical proposal without any showing of need. The State's interest in federalism and finality are fully served by the statute's current

construction. Moreover, extremely few habeas petitioners currently succeed; the administrative gains to the States would be de minimis; the costs to the federal system and the development of constitutional law would be enormous.

ARGUMENT

I. DOYLE VIOLATIONS SHOULD CONTINUE TO BE SUBJECT TO HARMLESS ERROR ANALYSIS

Last term, this Court engaged in considerable debate over shifting two constitutional violations -- confrontation clause and burden of proof violations -- from the "automatic reversal" category into the "harmless error" category. Ultimately, it determined that these sorts of violations should be reviewed under the harmless error standard. See Rose v. Clark, 106 S. Ct. 3101 (1986); Delaware v. Van Arsdall, 106 S.Ct. 1431 (1986). In this case, petitioner urges a far more radical shift that would require a defendant to

prove "actual prejudice" before obtaining relief after a serious constitutional due process error has been shown. This suggestion is based on a total misreading and distortion of this Court's decisions dealing with the differing standards of review once constitutional error has been found and a fundamental misconception of the nature of the constitutional error that results from a Doyle violation.

A. This Court Has Applied Two Standards of Review to Constitutional Error.

Petitioner's analysis and description of this Court's standard of review of constitutional error divides the standard into rigid subcategories depending on whether the right violated is based on "specific constitutional provisions," Brief of Petitioner at 19, or the "general" provisions of the Due Process Clause. As to the latter, petitioner claims, "actual prejudice" must be

shown before reversal of a criminal conviction is permitted.

In fact, this Court has never adopted an approach based on the "label" of the constitutional right. Rather, the Court has always applied a functional approach involving two separate standards that depend upon the nature of the constitutional error that has been found. See Rose v. Clark, 106 S. Ct. at 3105-07; id. at 3110-12 (Stevens, J., concurring).

First, automatic reversal is required for errors that render a trial fundamentally unfair, such as cases involving a coerced confession, Payne v. Arkansas, 356 U.S. 560 (1958), or cases where counsel was not furnished, Gideon v. Wainwright, 372 U.S. 335 (1963), and cases where important values unrelated to the truth seeking function of the trial are implicated, such as when racial prejudice was present in the selection of grand jurors, Vasquez v. Hillery,

106 S.Ct. 617 (1986), in the disqualification of petit jurors, Batson v. Kentucky, 106 S. Ct. 1712 (1986), or in an appeal to the jury, Miller v. North Carolina, 583 F.2d 701, 708 (4th Cir. 1978);

Second, harmless error analysis applies to almost all other constitutional errors, including many Due Process violations.

"Actual prejudice" is not a separate standard of review of constitutional error in the same sense as the two standards noted above. This Court has used this term, or similar concepts,[1] to describe the showing that a defendant must make to demonstrate that certain kinds of errors rise to a constitutional violation at all. See United States v. Bagley,

1. For purposes of simplicity, amici uses petitioner's term of "actual prejudice." In fact, this Court has used other language in the due process cases upon which petitioner relies. See e.g., Darden v. Wainwright, 106 S.Ct. 2464, 2472 (1986)("so infected the trial with unfairness"); United States v. Bagley, 105 S. Ct. 3375, 3383 (1985) ("reasonable probability ..[of] undermin[ing] confidence in the outcome.")

105 S. Ct. 3375, 3383 (1985); Strickland v. Washington, 104 S. Ct. 2052, 2064 (1984). But once it is determined that a constitutional error has occurred in these types of cases, the inquiry ends and the conviction is reversed. As explained below, special reasons relating to these types of errors require a defendant to show probable effect on the outcome before there is even a constitutional error.

Petitioner erroneously describes this "actual prejudice" category as if it were a large, amorphous one applicable to all violations of "general" due process rights, but not to specific constitutional limitations contained in the Fourth, Fifth and Sixth Amendments. That characterization is wrong for at least three reasons.

First, petitioner is wrong in his initial premise that harmless error analysis applies primarily to violations of "specific constitutional provisions" in the Fourth, Fifth

and Sixth Amendments and does not usually apply to "general" due process violations. Rose v. Clark itself, in which a jury instruction shifted the burden of proof to the defendant contrary to Sandstrom v. Montana, 442 U.S. 510 (1979), was a "general" due process case. But this Court in Rose explicitly held that harmless error applied to that type of due process violation. The Court has never suggested that any standard lower than harmless error should be applied to these burden of proof violations. See, e.g., Sandstrom, 442 U.S. at 526-27 (remanding for a determination whether the instruction was harmless error).

Sandstrom adopted a bright line rule that all jury instructions on presumptions that shift the burden to the defendant violate due process. Id. at 524. The fact is that many "general" due process violations like Doyle and Sandstrom develop their own "bright-line" definitions, becoming sub-categories of the due process

clause. The constitutional error is determined independently of its actual effect on the outcome of the trial. Within that area, any violation is subject to precisely the same harmless error test as a violation of the specific provisions of the Fifth and Sixth Amendments. See e.g., Bagley, 105 S. Ct. at 3382, n. 9 (standard of review of due process violations resulting from "knowing use of perjured testimony is equivalent to the Chapman harmless error standard."); Beck v. Alabama, 447 U.S. 625, 633 & n. 14 (1980)(due process violated when state fails to allow jury to consider lesser included offense in capital case when evidence supports such a verdict); Hopper v. Evans, 456 U.S. 605, 613-14 (1982)(Beck violation subject to Chapman harmless error standard).

Second, the "general" due process violations described by petitioner involve errors which do not reach constitutional

dimensions unless and until a prejudicial point is reached, such as the prosecutorial misconduct in Donnelly v. DeChristoforo, 416 U.S. 637 (1974) and Darden v. Wainwright, 106 S. Ct. 2464 (1986), or the use of armed guards in court, as in Holbrook v. Flynn, 106 S. Ct. 1340 (1986).

The same analysis applies with respect to violations under Brady v. Maryland, 373 U.S. 83 (1963). We do not know whether constitutional error has occurred unless we determine the effect of the withheld evidence on the trial; the definition of the right is inexorably linked to the effect of the violation itself. Under Brady and Bagley, supra, the prosecutor is required to produce exculpatory material. But there are numerous ways that evidence may be exculpatory, and it cannot be conclusively shown to be exculpatory unless we trace the possible uses of the material at the trial. The purpose of the Brady rule is to insure the proper functioning of the adversary process at the

trial and to insure that justice is done. See Bagley, 106 S. Ct. at 3380 n.6. Thus, the effect of the prosecutor's failure to produce exculpatory evidence reaches constitutional error only if it undermines the proper functioning of the adversary process to the extent that a court no longer has confidence in the outcome.

At the same time that the Court developed the "prejudice" standard for Brady violations, it recognized that if a prosecutor knowingly uses perjured testimony, the actual effect of the use becomes irrelevant and harmless error rules will apply. See Bagley, 106 S. Ct. at 3382 n. 9. That is true since, as Justice Stevens explained in another context in his concurrence in Rose v. Clark, 106 S. Ct. at 3110-12, the purpose of the rule is not only to protect the truth seeking function of a trial, but to insure that important values in the administration of justice are preserved as well, including the

requirement that prosecutors act fairly in the system. See also Smith v. Murray, 106 S. Ct. 2661, 2672 (1986)(Stevens, J., dissenting)("Our criminal justice system, and our Constitution, protect other values in addition to the reliability of the guilt or innocence determination, and the statutory duty to serve 'law and justice' should similarly serve those values.") The constitutional error is complete upon the knowing use of the perjured testimony. At that point, the normal harmless error rule comes into play.

Thus, this Court's functional approach has consistently recognized the important difference between specific "bright-line" violations such as that involved in Doyle, in which the constitutional error is complete upon the prosecutor's prohibited conduct, and the errors noted above in which some kind of "effect" on outcome must be shown before a constitutional violation even occurs.

Third, the division petitioner creates between "due process" violations in which prejudice must be shown and specific constitutional violations under the Fifth or Sixth Amendments where harmless error applies is wrong even in terms of the cases petitioner cites. Thus, in Strickland -- a Sixth Amendment and therefore a "specific Constitutional provision" case, see Strickland, 104 S. Ct. at 2064 -- this Court noted that a "bright-line" automatic reversal or harmless error rule applies in some instances, such as when a conflict of interest or government interference with counsel occurs, see id. at 2067. However, when the court examines counsel's professional errors in judgment, since there are so many ways that a lawyer may err, he is not considered constitutionally ineffective unless we determine, first, how far he has performed below the Plimsoll line of reasonably competent counsel, and second, what effect his

incompetence has had upon the trial. Only when both of these determinations are made, can we say that a Sixth Amendment error has occurred.

In short, the Court's approach has been a functional one, not the mere examination of constitutional labels. The "actual prejudice" standard applies when the initial "error," such as failure to meet minimum standards of professional competence or failure to produce exculpatory material, may have so many different ramifications that it cannot be considered constitutional error until we trace through its effects at the trial. Thus, a defendant must show actual prejudice from the error -- that it did effect his right to a fair trial, either under the due process clause or the Sixth Amendment -- by undermining the proper functioning of the adversarial process. That approach simply is irrelevant to a Doyle violation, which is constitutionally complete when the error is made.

B. Under Doyle, Use of Post-Miranda Silence Violates Due Process without Regard to the Trial's Outcome.

Doyle violations undermine the fundamental fairness of the adversary process and implicate the truth-seeking function of the criminal trial. Because of the interests protected by the Doyle rule, whether the use of post-Miranda silence "actually prejudiced" the defendant is irrelevant for due process purposes. Since the harmless error rule typically applies to the interests protected by Doyle, it should continue to be applied in this case.

1. A Doyle Violation, Without More, Undermines the Fair Administration of Justice.

At a minimum, the Miranda warning is an assurance that the State will not use the defendant's silence against him in any way: "... the state gives warnings to protect constitutional rights and implicitly promises that any exercise of those rights will not be penalized." Wainwright v. Greenfield, 106 S. Ct.

634, 639 (1986). The State's use of that silence at the trial to impeach the defendant after assuring him that he has the right to remain silent is "fundamentally unfair," as this Court has consistently repeated. See Fletcher v. Weir, 455 U.S. 603, 606 (1982). Therefore, when the prosecutor introduces the defendant's silence against him, the due process violation is complete.

Even if the silence were probative in some way, the State may not benefit by breaching its promise. The State, as the sovereign, must keep its word. It cannot convict a citizen by violating specific assurances given him at a prior time. See, e.g., Raley v. State of Ohio, 360 U.S. 423, 438 (1959)(state may not convict a person "for exercising a privilege which the State clearly had told him was available to him."); cf. Santobello v. New York, 404 U.S. 257, 262 (1971) (state bound by its plea bargains entered on the court record).

Thus, even if the Doyle rule had no truth-seeking purpose, it serves important interests in the administration of justice by requiring the State to keep its promises. It surely is not appropriate to permit the State to violate its assurances to its citizens unless the defendant can show that he suffered actual prejudice from such breaches.

Doyle provides prosecutors and courts with a clear rule that can be easily followed. Petitioner puts forth no credible reasons for its attempt to muddy that standard. Doyle violations are rarely inadvertent, heat-of-combat mistakes by prosecutors, unlike those that can be made during argument. See, e.g., Darden, supra. In this case, for example, the prosecutor deliberately began his cross-examination of defendant with his post-arrest silence. Moreover, because the breach of the State's promise to the defendant is "fundamentally unfair," it is a due process

violation. A fact-based inquiry into the effect of the violation on the course of the trial is irrelevant to the constitutional determination. Petitioner's attempt to equate Doyle violations with ineffective assistance of counsel or "fair trial" violations simply misses the point of the nature of the Doyle due process violation.

2. Post-Miranda Silence is "Insolubly Ambiguous."

This Court in Doyle indicated why it was necessary to establish a clear constitutional rule forbidding the use of a defendant's silence to impeach him after he received Miranda warnings:

> Silence in the wake of these warnings may be nothing more than the arrestee's exercise of these Miranda rights. Thus, every post-arrest silence is insolubly ambiguous because of what the State is required to advise the person arrested. 426 U.S. at 417.

Under these circumstances, a defendant's silence has little, if any, probative significance. It is both unreliable and

suspect, given the state's role in securing that silence.

Furthermore, a jury is likely to give undue weight to such silence if stressed by the prosecutor on cross-examination and on summation. In the same way that an alleged confession is devastating evidence in a criminal trial and therefore any use of an involuntary confession requires automatic reversal, see Payne v. Arkansas, 356 U.S. 560 (1958), use of ambiguous silence before the jury has such an undesirable impact that it is difficult, if not impossible, to weigh its effect. Permitting the prosecutor to cross examine a defendant on his silence or argue that the silence has any significance would confuse the jury and upset its truth seeking function in a fundamental manner. Thus, like other errors that upset the truth-seeking function without automatically rendering the verdict suspect, harmless error is

the appropriate standard for Doyle violations. See Rose v. Clark, 106 S. Ct. at 3105-07.

II. NEITHER THE HABEAS CORPUS STATUTE NOR THE NATURE OF HABEAS CORPUS JUSTIFIES A REQUIREMENT OF ACTUAL PREJUDICE AFTER CONSTITUTIONAL ERROR IS SHOWN.

Petitioner's second point deals not with the constitutional right asserted, but with the stage at which the constitutional violation is found. Petitioner starts with the proposition that this Court has already placed upon habeas petitioners some additional burdens that do not apply on direct review, e.g. default and exhaustion requirements, retroactivity determinations, and then argues, in effect, that for reasons of federalism and finality, this Court should judicially amend the habeas corpus statute and make it still more difficult for a state prisoner to succeed on habeas corpus.

But there is nothing in the habeas corpus statute or in this Court's decisions interpreting it that suggests a generalized need

to increase the burdens that a state prisoner must bear after he has shown constitutional error, as if he were a high jumper who must leap over a progressively higher bar each time he is unsuccessful on a prior jump. The habeas corpus statute, as interpreted by this Court, fully accounts for the State's interests in federalism and finality.

A. The Court Should Interpret the Habeas Statute In Light of Congressional Intent and the Purposes of Habeas Corpus Review.

We start with the obvious proposition that a specific statute and specific rules passed by Congress define the federal courts' habeas corpus jurisdiction. It follows that any radical redefinition of the scope of habeas review that would directly diminish the substantive constitutional protections afforded by the law should come from Congress and not from this Court.

Indeed, Congress could not possibly have intended that the habeas corpus statute should

be construed in the manner that petitioner suggests. Over the past four years Congress has had before it a number of proposals to restrict habeas corpus jurisdiction, some of which sought to accomplish the same goals as the petitioner. See S. 238, 99th Cong. 1st Sess. (1985) and S. 238, Habeas Corpus Reform, Hearings before the Sen. Judiciary Comm., 99th Cong., 1st Sess. (1985). Congress refused to enact any part of that provision or similar bills introduced earlier and described in the hearings. Under well-established canons of statutory construction, this Court should not adopt a new construction of a statute when Congress has explicitly rejected the suggested revision. See Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 733 (1975)(SEC-proposed amendment rejected by Congress; Court refuses to interpret statute along lines of rejected amendment).

The habeas corpus statute specifically grants jurisdiction in the federal courts in all

cases in which the petitioner claims he has been detained "in violation of the Constitution or laws ... of the United States." 28 U.S.C. Sect. 2241(c)(3). Likewise, this Court's appellate jurisdiction over state criminal trials is based upon the assertion of a "right, privilege or immunity ... specially set up or claimed under the Constitution." 28 U.S.C. Sect. 1257(3). On the face of the statutes, review of substantive constitutional rights are protected to the same extent under both provisions.

This Court has consistently noted the dual systems that have been established to insure that constitutional rights in the criminal justice system are fully protected, with the habeas corpus statute an "additional safeguard" in this regard. Stone v. Powell, 428 U.S. 465, 491 n.31 (1976). See also Kuhlmann v. Wilson, 106 S. Ct. 2616, 2623 (1986) (describing the extension of federal habeas corpus jurisdiction to include review of all constitutional errors,

until it became substantially coextensive with direct review by this Court). Congress adopted this expansion of habeas corpus review, amending the statute to conform to this Court's interpretation of the law. See Kuhlmann, 106 S. Ct at 2634 (Brennan, J. dissenting).

Thus, the entire federal judiciary took on the function and responsibility of enforcing constitutional safeguards in the state court criminal justice systems, with this Court reviewing a few cases each term on direct review and the district courts available -- in accordance with their statutory mandate -- to assume jurisdiction over the thousands of cases that this Court could not review on direct appeal.

Under this scheme and this Court's current interpretation of the statute, interests of federalism and finality are fully served. For example, the constitutional question must be first presented to the state courts for their

consideration, and review must be fully exhausted. Any fact finding made by the states courts, including the state appellate courts, must be accepted by the federal courts. Claims that are procedurally defaulted in the state courts can be brought in the federal courts only upon a showing of "cause" and "prejudice." Claims that illegally seized evidence have been improperly introduced at trial will not be heard by the federal courts if fully litigable in the state courts.

Once the prisoner has complied with these requirements, the state's interests have been fulfilled, and habeas corpus review should then be available as a safety net to catch those few claims "of 'disregard of the constitutional rights of the accused...where the writ is the only effective means of preserving his rights.'" Kuhlmann v. Wilson, 106 S. Ct. 2616, 2623 (1986) (quoting Waley v. Johnson, 316 U.S. 101, 104-05 (1942)). Given the state's wholly adequate

opportunity to protect a defendant's constitutional rights, it lacks any cognizable interest in having federal court review made under a lesser standard than the state applied in its initial review.

Viewed from another perspective, the federal courts perform what Justice Harlan called "a quasi-appellate review function, forcing both trial and appellate courts in both the federal and state system to toe the constitutional line." Mackey v. United States, 401 U.S. 667, 687 (1971) (Harlan, J., concurring)(emphasis added). However, the "continued availability of a mechanism for relief" from constitutional error, Kaufman v. United States, 394 U.S. 217, 226 (1969), would be seriously undermined if the standard of review was changed in the manner suggested by petitioner. The on-going dialogue between the state and federal courts on the meaning and definition of the Bill of Rights would be

seriously interrupted and distorted. In effect, state and federal courts would no longer be speaking the same language. Federal courts reviewing cases for constitutional error would no longer be viewing the case from the same perspective and under the same standards as the state courts.

Federal courts might also find it easier to reach the "actual prejudice" standard first before deciding whether constitutional error had occurred -- in effect, deciding that even if error were found, it would not have been prejudicial -- and thus never reach the substantive issues. Indeed, such an approach would also be consistent with traditional canons of constitutional adjudication. In Strickland, 104 S. Ct. at 2069-70, this Court suggested such an approach would be appropriate. The entire "quasi-appellate" procedure would become distorted in a manner that Congress could not possibly have intended. And an important guide

to the state courts in constitutional adjudication would be largely eliminated.

That approach would entail heavy constitutional costs. This Court can take judicial notice of the fact that some serious constitutional violations are not caught on their first review through the state court system or on direct review. The alternate route of habeas corpus is statutorily required to catch such cases the second time around. Certainly, petitioner's approach does nothing to encourage more careful state court consideration of constitutional claims.

Furthermore, it should be noted that cases establishing some of the most important constitutional rights over the past decades have found their way to this Court through federal habeas. See e.g., Cuyler v. Sullivan, 446 U.S. 335 (1980); Rose v. Mitchell, 443 U.S. 545 (1979); Crist v. Bretz, 437 U.S. 28 (1978). If federal courts routinely reviewed cases for

actual prejudice prior to an examination of constitutional claims, establishment of important constitutional rights could be delayed, if not indefintely postponed. See e.g., Vasquez v. Hillery, 106 S. Ct. 617 (1986).

It would surely be a significant strain on this Court and a loss to our federal system if additional substantive burdens were placed on habeas petitioners in a manner that would jeopardize plenary review of their claims in federal court. Petitioner's "actual prejudice" standard is a significant shift away from the purpose of habeas corpus as defined both by Congress and by this Court -- determining whether a prisoner's constitutional rights have been violated. It is a giant step toward reserving the writ only for those who can show factual innocence -- a step this Court and Congress has consistently rejected.

B. The Actual Prejudice Standard Would Impose Significant Costs on the Federal System.

The petitioner's standard would place substantial costs on the current structure of criminal justice review. But the State presents no countervailing interests that would justify this radical change.

The proposal proffers no limitations as to the type of constitutional right to which the "actual prejudice" standard would apply. It would apply to rights where automatic reversal would now be required. Even blatant violations of the most basic and fundamental rights -- right to counsel, right to an unbiased judge, right against use of coerced confessions, right against racial discrimination in the selection of grand and petit juries -- would not result in reversal on habeas corpus unless actual prejudice were shown. In other words, the proposal treats all rights, including those that are fundamental to a fair trial or to our

notions of justice, the same way, at the least rigorous end of the review spectrum.

If the Court, after adopting the "actual prejudice" standard felt compelled to create exceptions for some fundamental rights on habeas corpus, it would turn the habeas corpus statute on its head. In the face of the Congressional command to insure that no person be imprisoned "in violation of the Constitution," this Court would be forced to start a new process of weighing different rights in the habeas context, under standards of its own creation.

Petitioner makes absolutely no showing of any need for its proposal. Petitioner appears to be motivated by a generalized desire to make it more difficult for a state prisoner to succeed in a habeas proceeding. In view of the substantial accommodation to the State's interest already required prior to habeas review -- exhaustion, procedural default, preclusion of claims of use of illegally seized evidence,

presumption of correctness to state fact finding, colorable innocence for resubmitted claims -- those prisoners whose constitutional rights have in fact been violated should not be denied relief under the currently applicable standards of review. These standards impose no significant burdens on the States. Less than 2% of the submitted petitions are successful (in only 1.95% of the petitions determined in fiscal year 1986 was judgment rendered for the prisoner, according to figures supplied by the Administrative Office of the U.S. Courts). Before the Court acts to radically alter the nature of habeas corpus review, the Petitioner should be required to demonstrate the necessity of such a change, See e.g., Stone v. Powell, 428 U.S. at 492 . Given the current minimal success rates of habeas petitioners, the actual prejudice requirement is totally unnecessary.

CONCLUSION

For the reasons stated above, the judgment below should be affirmed.

Respectfully submitted,

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